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## PP v. DATUK WIRA SM FAISAL SM NASIMUDDIN KAMAL

HIGH COURT MALAYA, KUALA LUMPUR
COLLIN LAWRENCE SEQUERAH J
[CRIMINAL APPEAL NO: WA-41H-52-09-2017]
29 MARCH 2019

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***CRIMINAL PROCEDURE:*** *Appeal – Appeal against acquittal and discharge – Accused person charged for voluntarily causing hurt to wife – Offence under ss. 323 & 326 of Penal Code – Accused person applied to strike out charge before commencement of trial – Application not opposed by prosecution – Magistrate*

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*allowed application and struck out charge against accused person – Whether act of Magistrate in granting acquittal and discharge, before commencement of trial, misconceived in law – Whether act of Magistrate in striking out charges erroneous – Whether there was proper maximum evaluation of case – Whether accused person entitled to acquittal and discharge – Criminal Procedure Code, s. 173(g) & (f)*

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***CRIMINAL PROCEDURE:*** *Trial – Summary trial by Magistrate – Accused person charged for voluntarily causing hurt to wife – Accused person applied to strike out charge before commencement of trial – Magistrate allowed application and struck out charge against accused person pursuant to court's inherent jurisdiction – Whether charge defective warranting invoking of court's inherent jurisdiction –*

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*Whether inherent jurisdiction properly exercised and could be exercised in accused's case – Whether matter could be summarily determined – Whether matter to be determined only upon proper evaluation of evidence – Rules of Court 2012, O. 18 r. 19*

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***CRIMINAL LAW:*** *Penal Code – Sections 323 and 326 – Accused charged for voluntarily causing hurt to wife – Magistrate allowed accused person's striking out application before commencement of trial pursuant to court's inherent jurisdiction – Appeal by prosecution against acquittal and discharge of accused person before commencement of trial*

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The respondent was charged at the Magistrate's Court, for voluntarily causing hurt to his wife ('complainant'), an offence under s. 323 of the Penal Code, punishable under s. 326A of the same Code ('the charge'). Before the commencement of the trial, the respondent filed a notice of application ('NOA'), together with an affidavit-in-support, to strike out the said charge, on the grounds that the police report lodged by the respondent evinced that

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the complainant was the actual aggressor and he was only acting in self-defence. The respondent also relied on the inherent jurisdiction of the court, under O. 18 r. 19 of the Rules of Court 2012 ('ROC'), in support of his NOA. The appellant ('prosecution'), despite raising preliminary objection on the ground that the application was misconceived, did not oppose the NOA. The

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Magistrate allowed the NOA and struck out the charge, pursuant to O. 18 r. 19 of the ROC. Hence, the present appeal. In support of the appeal, the

prosecution submitted that (i) the acts of the Magistrate (a) in granting an acquittal and discharge, before the commencement of the trial, was misconceived in law; and (b) ordering the charges against the respondent be struck out was erroneous; (ii) s. 173 of the Criminal Procedure Code ('CPC') necessitates that an accused, who claims trial to a charge, has to undergo the process of a trial and, at the end of the prosecution's case after hearing testimonies of the witnesses, the court has to evaluate whether a *prima facie* case was made out in accordance with s. 173(f) of the CPC; (iii) an accused is entitled to an acquittal, without his defence being called, only if a *prima facie* case is not made out after a maximum evaluation of the prosecution evidence. Objecting to the appeal, the respondent argued that (i) a number of authorities indicated that the court has the power to strike out the charges. These authorities were (a) s. 99A of the Subordinate Courts Act 1948, read together with para. 19 of the Third Schedule, relating to the power to discharge, vary or suspend the operation of judgments or orders; (b) s. 173(g) of the CPC relating to power of the court to discharge the accused at any previous stage of the case if, for reasons to be recorded by the court, it considers the charge to be groundless; (c) O. 18 r. 19 of the ROC relating to striking out; and (d) the case of *Ahmad Zubair Hj Murshid v. PP* which related to the inherent powers of the court; and (ii) since the averments in the affidavit in support of the NOA were unrebutted, they were, therefore, admitted by the complainant.

**Held (allowing appeal):**

**(1)** Section 173 of the CPC lays out the manner in which a summary trial should proceed commencing with the institution of the charges until its conclusion. Paragraph (g) of s. 173 of the CPC cannot be read in isolation; it must be read together with the rest of the section, in particular para. (f) which outlines the duty of the court at the conclusion of the prosecution's case. A reading of the section, as a whole, envisages that when a charge is instituted, the process of a trial, if an accused pleads not guilty, is for evidence to be led in order to enable the court to evaluate the evidence in coming to a conclusion as to whether there is sufficient evidence to call for defence or to evaluate whether the prosecution has proved its case beyond reasonable doubt at the conclusion of the trial as the case may be. Therefore, the act of discharging an accused person charged by reason that the charge is groundless, could only be made after evidence is led and this necessitates that the trial commences first. The act of the Magistrate, in entertaining the application to strike out the charge pursuant to the NOA without hearing evidence from the prosecution, was misconceived in law. (paras 20, 21, 24, 26 & 27)

**(2)** The issue at hand was not one of the non-rebuttal of the complainant leading to an implicit acceptance of the contents of the affidavit-in-support but rather, whether the procedure adopted by the Magistrate, in entertaining the application for striking out, was correct in law. The Magistrate erred when he, instead of proceeding to hear the case, entertained the NOA. The procedure adopted by the Magistrate ignored the discretion of the Public Prosecutor ('PP') to institute charges, pursuant to art. 145(3) of the Federal Constitution and s. 376(1) of the CPC. Case laws demonstrated the powers of the PP in discontinuing proceedings for an offence and the discretionary prerogative of the PP in the institution and the conduct of cases brought to the court. (paras 32, 33, 36 & 37)

**(3)** With regard to the use of the provisions of O. 18 r. 19 of the ROC, there was no doubt that there were instances where the provisions of the ROC may properly be resorted to in the event of an obvious *lacuna* in the CPC. However, it could not be taken that the ROC applied wholesale to criminal procedure and the provisions of the ROC had no application to this case. There are specific provisions relating to the procedure and conduct of summary trial laid down in s. 173 of the CPC. The inherent jurisdiction of the court could not be resorted to. This was also not a case primarily grounded upon whether the charge was defective in substance and form. The essential ingredients were stated clearly in the charge, including the date, time, place and act. The issue of whether the respondent lawfully exercised his right of private defence was a matter to be determined upon the proper evaluation of the evidence after the hearing and evaluation of evidence given by witnesses and not a matter to be summarily determined upon a consideration of averments contained in affidavits. The case was ordered to be remitted back to the Magistrate's Court, before a different Magistrate, to commence hearing of the trial upon the charge brought by the prosecution. (paras 40-43, 45 & 46)

**Case(s) referred to:**

*Ahmad Zubair Hj Murshid v. PP [2014] 9 CLJ 289 FC* ***(refd)***

*Dato' Mohamed Hashim Shamsuddin v. Attorney-General, Hong Kong [1986] 1 LNS 173 SC* ***(refd)***

*Gapari Kitingan v. The Attorney-General, Malaysia [1991] 1 CLJ 247; [1991] 1 CLJ (Rep) 129 SC* ***(refd)***

*Kunn Rekon Holdings Sdn Bhd v. PP & Other Applications [1996] 2 CLJ 689 HC* ***(refd)***

*Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA* ***(refd)***

*PP lwn. Abdul Razak Khan Abdul Aziz Khan & Yang Lain [2009] 1 LNS 322 HC* ***(refd)***

*PP v. Hettiarachigae LS Perera [1976] 1 LNS 98 HC* ***(refd)***

*PP v. Ling Leong Kong [2009] 1 CLJ 211 HC* ***(refd)***

*PP v. Zainuddin Sulaiman & Ors [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 SC* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, ss. 173(f), (g), 376(1)
Federal Constitution, arts. 5, 145(3)
Penal Code, ss. 102, 323, 326A
Rules of Court 2012, O. 1 r. 2(2), O. 18 r. 19
Rules of the High Court 1980, O. 1 r. 2(2)
Subordinate Courts Act 1948, s. 99A

*For the prosecution - Mohd Razdi Mohd Shah, Nur Aishah Ahmad Zalehuddin & Zilfinas Abbas; DPPs*
*For the respondent - Akberdin Hj Abdul Kader & Ummi Kartini Abd Latiff; M/s Akberdin & Co*

*Reported by Najib Tamby*

## JUDGMENT

**Collin Lawrence Sequerah J:**

### Introduction

**[1]** The respondent was charged under s. 323 of the Penal Code punishable under s. 326A of the same Code as follows:

> Bahawa kamu pada 22/11/2015 jam lebih kurang 12.30 tengahari hingga 4.30 petang bertempat di alamat No.2A Serene Kiara 2, Jalan Kiara 3, Desa Sri Hartamas, dalam daerah Brickfields, di Wilayah Persekutuan Kuala Lumpur telah dengan sengaja telah mendatangkan cedera kepada seorang perempuan melayu nama Emilia Binti Hanafi KP NO: 790630-10-5552 yang mana wujudnya satu ikatan perkhawinan yang sah. Oleh yang demikian, kamu telah melakukan kesalahan dibawah s.323 kanun keseksaan dan boleh dihukum dibawah s.326A kanun yang sama.

**[2]** Before the case commenced however, the respondent filed a notice of application ("NOA") dated 27 October 2016 together with an affidavit in support which *inter alia*, contained a prayer for the charge under s. 323/326A of the Penal Code instituted against the respondent to be struck out. The appellant did not file any affidavit in opposition save to raise a preliminary objection that the application was misconceived.

**[3]** The main grounds upon which the NOA was premised was that pursuant to a police report lodged by the respondent, it was evident that he had only acted in self-defence and that the complainant, who was his ex-wife, was the actual aggressor. As such, the charge was groundless and constituted an abuse of process.

**[4]** The Magistrate also found that as there was no affidavit in opposition filed, the averments in the affidavit in support of the NOA were deemed admitted.

**[5]** Besides invoking the inherent jurisdiction of the court, the respondent also relied upon O. 18 r. 19 of the Rules of Court 2012 ("ROC") in support of the NOA.

**[6]** The learned Magistrate on 30 August 2017 allowed the NOA and struck out the charge against the respondent pursuant to O. 18 r. 19 of the ROC. The prosecution ("appellant"), being aggrieved with the decision has filed an appeal.

**Contentions Of Parties**

*Appellant*

**[7]** The appellant submitted that the act of the Magistrate in granting an acquittal and discharge before the commencement of the trial was misconceived in law.

**[8]** In summary, it was submitted that the provisions of s. 173 of the Criminal Procedure Code ("CPC") necessitated that an accused who claimed trial to a charge had to go through the process of a trial and at the end of the prosecution case after hearing of witnesses testimonies, the court had to evaluate whether a *prima facie* case was made out in accordance with s. 173(f).

**[9]** Only should a *prima facie* case not be made out after a maximum evaluation of the prosecution evidence is the accused entitled to an acquittal without his defence being called.

**[10]** Therefore when the Magistrate ordered that the charges against the respondent be struck out, he had erred.

*Respondent*

**[11]** The respondent on the other hand, submitted a number of authorities that indicated that the court has the power to strike out charges.

**[12]** Among the authorities cited in support of this proposition were s. 99A of the Subordinate Courts Act 1948 read together with para. 19 of the Third Schedule relating to the power to discharge, vary or suspend the operation of judgments or orders, s. 173(g) of the CPC relating to power of the court to discharge the accused at any previous stage of the case if for reasons to be recorded by the court it considers the charge to be groundless and O. 18 r. 19 ROC relating to striking out.

**[13]** The provisions of art. 5 of the Federal Constitution that no person shall be deprived of his life or liberty save in accordance with law was also cited.

**[14]** Learned counsel for the respondent also alluded to the inherent powers of the court and cited *inter alia* the case of *Ahmad Zubair Hj Murshid v. PP* [2014] 9 CLJ 289 in support.

**[15]** Learned counsel for the respondent also took the position that based upon his police report filed *vide* Sri Hartamas 001420/15 dated 23 November 2015 and the contents of his affidavit in support, the respondent was merely exercising his right to private-defence against the aggression of the complainant. The institution of the charges against the respondent therefore amounted to an abuse of process.

**[16]** It was also submitted that the averments in the affidavit in support of the NOA were unrebutted and therefore deemed admitted by the respondent.

**Analysis And Findings**

**[17]** The central issue in this case revolves around the procedure relating to summary trials before the Magistrate's Court. The procedure relating to the procedure in summary trials is contained in s. 173 of the CPC.

**[18]** In order to properly appreciate the manner in which summary trials are meant to operate, it is necessary to reproduce s. 173 in its entirety.

*Section 173 CPC*

**[19]** The said section which is parked under Part VI and Chapter XIX reads as follows:

**Part VI PROCEEDINGS IN PROSECUTIONS**

Chapter XIX SUMMARY TRIALS BY MAGISTRATES

173. Procedure in summary trials

The following procedure shall be observed by Magistrates in summary trials:

(a) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried.

(b) If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted on it and the Court shall pass sentence according to law:

Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

(c) If the accused refuses to plead or does not plead or claims to be tried, the Court shall proceed to take all such evidence as may be produced in support of the prosecution.

A (d) When the Court thinks it necessary it shall obtain from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before itself such of them as it thinks necessary.

B (e) The accused shall be allowed to cross-examine all the witnesses for the prosecution.

(f) (i) When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

C (ii) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

(g) Nothing in paragraph (f) shall be deemed to prevent the Court from discharging the accused at any previous stage of the case if for reasons to be recorded by the Court it considers the charge to be groundless.

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(h) (i) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged, the Court shall call upon the accused to enter on his defence.

E (ii) If the Court finds that a *prima facie* case has been made out against the accused on an offence other than the offence charged which the Court is competent to try and which in the opinion of the Court it ought to try, the Court shall amend the charge.

F (iii) For the purpose for subparagraphs (i) and (ii), a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

(ha) When the Court calls upon the accused to enter on his defence under subparagraph (h)(i), the Court shall read and explain the three options to the accused which are as follows:

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(i) to give sworn evidence in the witness box;

(ii) to give unsworn statement from the dock; or

(iii) to remain silent.

H (i) The charge if amended shall be read to the accused as amended and he shall be again asked whether he is guilty of the offence in the charge as amended.

(j) (i) If the accused pleads guilty to the charge as amended, the plea shall be recorded and he may be convicted on it and the Court shall pass sentence according to law:

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Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

(ii) If the accused does not plead guilty to the charge as amended, the accused shall be called upon to enter on his defence.

(iii) When the accused is called upon to enter on his defence, he may produce his evidence and shall be allowed to recall and cross-examine any witness present in the Court or its precincts:

Provided that if the accused elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence:

Provided further that any accused person who elects to be called as a witness may be cross-examined on behalf of any other accused person.

(k) If the accused puts in any written statement the Court shall file it with the record.

(l) (i) If the accused applies to the Court to issue any process for compelling the attendance of any witness (whether he has or has not been previously examined in the case) for the purpose of examination or cross-examination or the production of any document or other thing, the Court shall issue the process unless it considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice, in which case that ground shall be recorded by it in writing.

(ii) The Court may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

(m) (i) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(ii) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it and the Court shall pass sentence according to law. Provided that before the Court passes sentence, the Court shall, upon the request of the victim of the offence or the victim's family, call upon the victim or a member of the victim's family to make a statement on the impact of the offence on the victim or his family; and where the victim or a member of the victim's family is for any reason unable to attend the proceedings after being called by the Court, the Court may at its discretion admit a written statement of the victim or a member of the victim's family.

(iii) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

A (n) When the proceedings have been instituted upon the complaint of some person upon oath under section 133 and upon any day fixed for the hearing of the case the complainant is absent and the offence may lawfully be compounded, the Court may, in its discretion, notwithstanding anything hereinbefore contained, discharge the accused at any time before calling upon him to enter
B upon his defence.

(o) If the accused does not appear at the time and place mentioned in the summons and it appears to the Court that the summons was duly served a reasonable time before the time appointed for appearing and no sufficient ground is shown for an adjournment the
C Court may either proceed *ex parte* to hear and determine the complaint or may adjourn the hearing to a future day.

**[20]** It will be observed that the whole scheme of s. 173 of the CPC basically lays out the manner in which a summary trial should proceed commencing with the institution of the charges until its conclusion.

D **[21]** A reading of the section as a whole envisages that when a charge is instituted, the process of a trial if an accused pleads not guilty is for evidence to be led in order to enable the court to evaluate the evidence in coming to a conclusion as to whether there is sufficient evidence to call for defence or to evaluate whether the prosecution has proved its case beyond reasonable
E doubt at the conclusion of the trial as the case may be.

**[22]** Learned counsel for the respondent alluded to para. (g) of s. 173 which empowers the court to discharge the accused at any previous stage of the case if for reasons to be recorded by the court it considers the charge to be groundless.

F **[23]** However, it is important to note that this is done only upon reasons to be recorded by the court if it considers the charge to be groundless. This implicitly means that evidence must be first led in order to enable the court to consider if there are sufficient reasons to discharge the accused before the
G conclusion of the case for the prosecution.

**[24]** Paragraph (g) also cannot be read in isolation but must be read together with the rest of the section in particular para. (f) which outlines the duty of the court at the conclusion of the prosecution case.

**[25]** I am fortified in coming to such finding by the case of *PP v. Ling Leong*
H *Kong* [2009] 1 CLJ 211; [2008] 8 MLJ 236 which held *inter alia*, as follows:

> Section 173(g) Of The Criminal Procedure Code
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> [5] Section 173(g) of the CPC in itself, must be read with s. 173(f) as it made special reference to that particular sub-section. It is noted that s. 173
I of the Code is prefixed by the sentence: 'The following procedure shall be observed by magistrates in summary trials'. It is an imperative

procedural guide in summary trials that gives no room for discretion beyond the ambit of that section. Section 173(f) and 173(g) of the CPC reads as follows:

173 Procedure in summary trials

The following procedure shall be observed by Magistrates in summary trials:

(a) …;

(b) …;

(c) …;

(d) …;

(e) …;

(f) …;

(i) When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(ii) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

(g) Nothing in paragraph (f) shall be deemed to prevent the Court from discharging the accused at any previous stage of the case if for reasons to be recorded by the Court considers the charge to be groundless.

*[6] The wordings 'at any previous stage of the case' in sub-s (g) must be read in the light of sub-s (f); which means that it is a stage after the prosecution has proceeded with its case but before the conclusion of the prosecutions' case. It is very different from the wordings 'at any stage of any trial' as can be found in s 254 of the CPC.*

*[8] To my mind, before the court can invoke s 173(g) of the Code, the court must at least allow the prosecution to proceed with its case. By doing so, then only the court can evaluate the evidence and its circumstances for the court to consider and conclude that the charge to be groundless.* (emphasis added)

**[26]** Therefore the act of discharging an accused charged by reason that the charge is groundless can only be made after evidence is led and this of course necessitates that the trial commences first.

**[27]** It is evident therefore that the act of the learned Magistrate in entertaining the application to strike out the charge pursuant to the NOA without hearing evidence from the prosecution was misconceived in law.

*The Respondent Acted In Self-defence*

**[28]** The Magistrate had also considered the contents of a police report Sri Hartamas No: 001420/2015 dated 23 November 2015 lodged by the respondent which *inter alia* stated that during a quarrel between the complainant and the respondent on 22 November 2015, the complainant behaved in an aggressive manner whereupon the respondent acted in self-defence and suffered certain injuries as a result of which he was hospitalised.

**[29]** The Magistrate also took into account the fact that the complainant was the holder of a "black belt" in karate and therefore not in a weak or disadvantaged position and therefore the respondent had every right to exercise his right of private-defence under s. 102 of the Penal Code.

**[30]** The Magistrate also alluded to other instances of aggression from the complainant including her acts of disobedience to certain orders of the KL Syariah Court.

**[31]** As these averments by way of affidavit were not rebutted by way of a counter affidavit, the Magistrate treated this as an admission on the part of the complainant relying on *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609 and other cases to similar effect.

**[32]** While there can be no quarrel with the proposition expressed in that case, with respect, the issue here was not one of the non-rebuttal of the complainant leading to an implicit acceptance of the contents of the affidavit in support but rather whether the procedure adopted by the Magistrate in entertaining the application in the first place was correct in law.

*PP's Discretion To Institute Charges*

**[33]** The procedure adopted by the learned Magistrate had also ignored the discretion of the Public Prosecutor ("PP") to institute charges pursuant to art. 145(3) of the Federal Constitution and s. 376(1) of the CPC.

**[34]** In respect of the powers of the PP, the case of *PP v. Hettiarachigae LS Perera* [1976] 1 LNS 98; [1977] 1 MLJ 12, the court held:

> ... according to article 145 of the Federal Constitution only the Attorney-General has the power to institute, conduct or discontinue any proceedings for an offence. Until he makes up his mind the courts have to wait. Magistrates therefore have no business to usurp the functions of the Attorney-General.

**[35]** In *PP v. Zainuddin Sulaiman & Ors* [1986] 1 CLJ 468; [1986] CLJ (Rep) 232; [1986] 2 MLJ 100, the court held:

> Since the Attorney-General has this power exercisable at his discretion, it is not for the Court to say when the prosecution has to close its case or has to come to an end …

**[36]** These cases demonstrate the powers of the PP in discontinuing proceedings for an offence but the point that very clearly emerges from these cases is the discretionary prerogative of the PP in the institution and the conduct of cases brought to court.

**[37]** With the greatest of respect therefore, the Magistrate had erred when instead of proceeding to hear the case, he entertained the NOA.

*Inherent Jurisdiction Of The Court*

**[38]** Learned counsel for the respondent cited the case of *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v. Public Prosecutor* [2014] MLJU 991 in support of his submission that the court has vested in it inherent powers to set aside and quash or stay charges in order to prevent an oppressive and *mala fide* prosecution.

**[39]** However, it was also held in the same case with respect to the inherent powers of the court to set aside and quash or stay charges as follows:

> … we must caution ourselves that *the inherent powers of the Court must be exercised in exceptional circumstances to prevent undue oppression and abuse of the process of the Court.* It should also be noted that the inherent jurisdiction of the Court springs not from legislation but from the nature and constitution of the Court as a dispenser of justice! (see: *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors* [2013] 4 MLJ 35). As such we may hasten to add that *the inherent jurisdiction of the Court is therefore not as wide as it seems to be. Much depends on the facts and circumstances and clearly the Court cannot exercise its inherent jurisdiction in respect of any matter covered by specific provisions of the law or if its exercise would infringe any specific provisions of the law.* (emphasis added)

**[40]** In the present case, there were specific provisions relating to the procedure and conduct of summary trials laid down in s. 173 of the CPC. The inherent jurisdiction of the court cannot therefore be resorted to.

**[41]** This was also not a case primarily grounded upon whether the charge was defective in substance and form. A perusal of the charge will indicate that all the essential ingredients were stated clearly including the date, time, place and act.

**[42]** The issue of whether or not the respondent had lawfully exercised his right of private defence was a matter to be determined upon the proper evaluation of the evidence after the hearing and evaluation of evidence given by witnesses and not a matter to be summarily determined upon a consideration of averments contained in affidavits.

*Order 18 r. 19 ROC*

**[43]** With regard to the use of the provisions of O. 18 r. 19 of the ROC, no doubt there are instances where the provisions of the ROC may properly be resorted to in the event of an obvious lacuna in the CPC, for example, in the case of *Kunn Rekon Holdings Sdn Bhd v. PP* [1996] 2 CLJ 689; [1996] 5 MLJ 261 where the then Rules of the High Court 1980 were held to be applicable to affidavits notwithstanding O. 1 r. 2(2) which is similar to O. 1 r. 2(2) of the ROC.

**[44]** Other instances of such cases are *Dato' Mohamed Hashim Shamsuddin v. Attorney-General, Hong Kong* [1986] 1 LNS 173, *Gapari Kitingan v. The Attorney-General, Malaysia* [1991] 1 CLJ 247; [1991] 1 CLJ (Rep) 129; and *PP lwn. Abdul Razak Khan Abdul Aziz Khan & 2 Yang Lain* [2009] 1 LNS 322.

**[45]** However, it cannot be taken that the ROC applies wholesale to criminal procedure. As stated earlier, the position regarding the conduct of summary trials is covered by s. 173 of the CPC. There is therefore no lacuna that exits in this area. Under these circumstances, the provisions of the ROC have no application.

*Decision*

**[46]** In the premises, the appeal is allowed. The case is ordered to be remitted back to the Magistrate's Court before a different Magistrate to commence hearing of the trial upon the charge brought by the prosecution.

**[47]** The case to be mentioned on 28 March 2019 before the Magistrate's Court.